No. 8686

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARCHIE POULAS,

Appellant,

—VS.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

J. CHARLES DENNIS,
United States Attorney.

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STATEMENT OF THE CASE

On February 17th, 1937, N. F. Strubin and E. T. Kelly, Agents of the Alcohol Tax Unit, received information from a source which they had theretofore

found reliable, that the defendant Archie Poulas was to make a delivery of untaxpaid moonshine whiskey to a frame dwelling located on the westerly side of the 3100 block of Western Avenue, in Seattle, Washington, and that such delivery would be made on the afternoon of the same date, February 17th, 1937, some time after 3 o'clock (Tr. 33, 35, 37, 38, 41, 44). The information was further to the effect that the defendant would be driving a brown 1934 Model Oldsmobile sedan, bearing Washington License No. A-25-809 (Tr. 33, 35. 39, 43). Agent Strubin knew that the appellant had a reputation for being a persistent violator of the liquor laws of the United States (Tr. 34).

Acting on the information given, both Agents proceeded at about 3:30 P. M. on February 17th, 1937 to the vicinity of the 3100 block on Western Avenue Seattle, and placed this area under observation (Tr. 33, 35, 38, 41). At about 4:15 P. M. on the same date, defendant appeared driving a brown 1934 Model Oldsmobile sedan, bearing Washington License plates No. A-25-809, drove the car on the 3100 block of Western Avenue, and stopped it before a frame dwelling house

on that street (Tr. 33, 35, 38, 41, 42). The two Government Agents then drove their car to the side of the car occupied by appellant, Agent Kelly got out, approached the car in which appellant was still sitting, advised him that he, Kelly, was a Federal officer, and inquired of appellant what he had in the car. (Tr. 34, 36, 38, 40, 41, 42). Appellant answered that he had "some moonshine whiskey," or that he had some "moonshine," (Tr. 34, 36, 38, 39, 40, 42, 44). Thereupon the Agents searched the car and found on the floor of the back seat of the car five 1-gallon jugs of untaxpaid moonshine whiskey, contained in a gunny sack which had before been concealed from their view by a blanket completely covering the gunny sack (Tr. 34, 36, 40, 42, 43, 44).

Thereupon appellant was arrested (Tr. 34, 36, 38. 39).

The whiskey contained in the car could not be seen from the outside, and the Agents did not know of their own knowledge that the car did contain untaxpaid whiskey prior to the search (Tr. 40, 42, 43). Agent Kelly had before been looking for the appellant, knew

that appellant was using this particular car, and expected to find contraband whiskey in the car (Tr. 43). Kelly had been looking for this particular car from February 9th to February 17th, and had before received information concerning it (Tr. 43). Kelly, however, had not received any information regarding the expected delivery to 3100 Western Avenue until February 17th, the day of the arrest (Tr. 44). The Agents had no search warrant (Tr. 43, 49).

QUESTIONS

The primary questions presented are whether the search of appellant's car, the seizure of the moonshine whiskey, and the arrest of appellant were lawful or unlawful in view of the fact that the Government Agents had no search warrant.

ARGUMENT

Appellant's brief confines itself to a discussion of the sufficiency of the search, seizure and arrest, and we likewise confine our discussion.

Appellant's Petition to Suppress (Tr. 4, 29-31) failed to allege that appellant was the owner of the moonshine whiskey, and contained no allegation that he claimed any interest whatsoever in the liquor seized. Neither does appellant's Affidavit in Support of Petition to Suppress (Tr. 7, 8, 31, 32) contain any statement whatsoever to the effect that appellant owned or claimed any interest whatsoever in the seized liquor.

It is well established that only the owner of, or one claiming an interest in, the article seized can object to the seizure as unlawful or unreasonable.

Lewis v. United States, (CCA9) 6 Fed. (2d) 222;

Armstrong v. United States, (CCA9) 16 Fed. (2d) 62, (cert. den. 273 U. S. 766);

Kwong How v. United States, (CCA9) 71 Fed. (2d) 71.

In view of appellant's failure to claim or show any interest or ownership in the seized liquor, the Court was correct in denying the suppression of the evidence as prayed for by appellant (Tr. 36, 37).

As appellant offered no evidence whatsoever at the trial (Tr. 47), no contention can be made that any claim of ownership to, or interest in, the liquor seized was made subsequent to the hearing of the Petition to Suppress.

Apart from the foregoing, however, in view of the uncontroverted affidavits of N. F. Strubin (Tr. 33, 34) and E. T. Kelly (Tr. 35, 36) filed in opposition to the Petition to Suppress, the Court did not err in denying the suppression of the evidence.

A leading case on the validity of searches and seizures with respect to automobiles is *Carroll v. United States*, 267 U. S. 132. The facts there, in brief, disclose that the Government Agents had contacted the defendants some time prior to the date of the arrest, and arranged for a delivery by the defendants to the Agents of illicit liquor. The defendants at the time of the meeting said that they would be required to go to Grand Rapids to obtain the liquor and would be back later. The defendants had gone to the meeting in an Oldsmobile Roadster, the license number of which the Agents obtained at that time and later identified. The defendants did not reappear to make the promised delivery. Some two months later the Agents, while in their regular patrol between Grand Rapids and Detroit, observed the defendants driving in the same car. The Agents pursued the car, overtook it stopped and searched it, and found the car to contain contraband whiskey. The Agents at the time were not looking for the defendants and had no search warrant for them. The Court in an exhaustive opinion upheld the search, seizure and arrest, distinguishing between searches and seizures without a warrant with respect

to private dwellings and structures and automobiles.

The Court said in part:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. * * *
>
> We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motorboat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.
>
> The measure of legality of such a seizure is therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein, which is being illegally transported. We here find the line of distinction be-

"tween legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. * * * Such a rule fulfills the guaranty of the Fourth Amendment. * * *

The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. * * *

That the officers when they saw the defendants believed that they were carrying liquor we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. We do not perceive that it has any weight. As soon as they did appear, the officers were entitled to use their reasoning faculties upon all the facts of which they had previous knowledge in respect to the defendants. * * *

In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched."

Another leading case on the subject is *Husty v. United States*, 282 U. S. 694. There the arresting officer had previously received information from a source he had before found reliable to the effect that the defendant had two loads of liquor in automobiles of a particular make and description, parked at a designated place. The officer, acting on the information, found one of the cars described at the indicated point with no one in it. Later the defendant and two others entered the car. As the defendant was in the act of starting the car, he was stopped by the officer and the two others fled. The officer searched the car and found illicit whiskey. The officer had no search warrant. In sustaining the search, seizure and arrest the Court said, in part:

> "The Fourth Amendment does not prohibit the search, without warrant. of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search. *Carroll v. United States*, 282 U.S. 132. We think the testimony which we have summarized is ample to establish the lawfulness of the present search. To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act.

"*Dumbra v. United States*, 268 U. S. 435, 441; *Carroll v. United States*, *supra*. It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. See *Dumbra v. United States*. *supra; Stacey v. Emery*, 97 U. S. 642, 645. * * The search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car or how soon it would be removed. In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant. The search was, therefore, on probable cause and not unreasonable; and the motion to suppress the evidence was rightly denied."

The case of *Kaiser v. United States*, (CCA8) 60 Fed. (2d) 410, (Cert. den. 287 U. S. 654), is squarely in point here. The facts there show that the arresting officers previously had information that certain premises were used as an office for taking orders for alcohol, and that certain other premises owned by the defendants were used as a storage plant for the al-

cohol. The information further disclosed that cars approaching the premises used for storage went through certain specified peculiar actions before actually arriving at the place of storage. On the date of the arrest, the officers observed a Ford car leave the premises used as an office. Trailing the car, it was observed that the car performed the peculiar actions which the informant had described, and was then driven to the premises reported used as a storage place. When the Ford car stopped on the latter premises, the Agents approached the car and before any arrest or search was made, they asked the occupants of the car what was contained in it. One of the defendants replied that the car contained alcohol. The officers then arrested both defendants, searched the car and found that it did in fact contain alcohol. The lower Court denied a motion to suppress the evidence so obtained, ruling that the objection that the search and seizure were unlawful was untenable. In sustaining the lower Court, the Circuit Court, after referring to the *Carroll* and *Husty* cases above cited said:

> "It seems to us that the circumstances disclosed in the evidence given at the time of the hearing on the motion would lead a reasonably discreet and prudent man to believe that the operators of the car were in the illegal possession of liquor in the automobile, and that is the test of probable cause. There was certainly reasonable ground to stop the car and make inquiry, and, when inquiry was made, McCormick admitted that there was alcohol in the car. The officers then had reason to believe that a felony was being committed in their presence, and therefore had the right to arrest defendants and make the search and seizure of the liquor."

The only material distinction between the above case and the instant one is that there the arrest preceded the search, whereas here the search preceded the arrest. The fact is immaterial. *Carroll v. United States, supra; Husty v. United States, Supra.*

Likewise, in *Turner v. United States,* (CCA10), 73 Fed. (2d) 838. Officers on September 1st, 1933, were informed that the defendant was back in the whiskey business. They were informed on September 25th, 1933, that he was going to another city for a load of liquor, and in addition were given the kind of car he was driving, as well as the license number of

the car. The officers watched for his return, and on September 29th, 1933, saw him in the car described approaching from the direction of the other city, followed him, and stopped his car. Upon the officers approaching him, he stated, "There is no use looking. It is full."—or something to that effect. A search of the car disclosed that it contained liquor. The Court held that the search and seizure were not unlawful, and that no constitutional right of the defendant had been violated, citing the *Carroll* and *Husty* cases, *supra.*

In *McInes v. United States* (CCA9), 62 Fed. (2d) 180, (cert. den. 288 U. S. 616), the arresting officer had previously received information from a source theretofore found to be reliable that a certain Ford coupe bearing designated license plates would be driven from California to Oregon on the Pacific Highway, and that the car would be loaded with intoxicating liquor. Acting on this information, the officer later observed the car approaching, and upon stopping it and searching it, found the liquor. This Court, citing the *Husty* and *Carroll* cases, *supra*, upheld the validity of the search and seizure.

Additional cases to the same effect are as follows:

Bess v. United States, (CCA4) 49 Fed. (2d) 884;

Roach v. United States, (CCA4) 51 Fed. (2d) 65;

Cassidy v. United States, (CCA DC) 49 Fed (2d) 504;

United States v. Notto, (CCA2) 61 Fed. (2d) 781;

Weathersbee v. United States, (CCA5) 62 Fed. (2d) 822.

Furthermore the evidence of Strubin and Kelly introduced at the trial (Tr. 37, 44) developed nothing in conflict with the affidavits previously filed in opposition to the Petition to Suppress. As a matter of fact, the evidence strengthened the Government's position in that Kelly testified he was familiar with appellant and knew that he was driving this particular car (Tr. 41). That Kelly had been looking for appellant, suspecting that appellant was using the car to transport illicit liquor. As above stated, neither the the affidavits nor the testimony of Strubin or Kelly were controverted.

It is clear from the foregoing authorities that appellant's contentions are without any merit whatsoever.

It is significant that, in his brief, appellant cites neither of the United States Supreme Court cases above cited, nor the *McInes* case, *supra*, decided in this Circuit; nor does he cite any other case which is in point except *Kaiser v. United States*, *supra*, which, as above demonstrated, is clear authority against appellant.

Appellant devotes considerable argument to the fact that it is to him incredible that anyone should truthfully answer that he has contraband articles in his possession, upon being questioned by an officer, and infers that the Government Agents were stretching the truth, if not committing perjury. There is no need to consider these arguments, inasmuch as appellant did not take advantage of his opportunity to controvert the affidavits of the Agents, and offered no evidence whatsoever on the trial. Both the Court and the jury found that the Government Agents were worthy of belief.

CONCLUSION

It is respectfully urged that the lower Court committed no error in denying appellant's Petition to Suppress the liquor seized, and in overruling all of appellant's objections which arose from the fact that such Petition to Suppress was denied and the seized liquor admitted in evidence. The judgment should be affirmed.

Respectfully submitted,

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